



August 16, 2004

Mr. David Reese
Environmental Planning
Office of Safety and Environment
Management Directorate
Department of Homeland Security
Washington, DC 20528

Dear Mr. Reese:

OMB Watch appreciates the opportunity to comment on the Department of Homeland Security's (DHS) draft directive on policy and procedures for implementing the National Environmental Policy Act (NEPA), and its subsequent amendments. OMB Watch applauds DHS's recognition that environmental considerations must be taken into account when carrying out agency activities, and that the public plays a unique and important role in this process. However, Sections 6.2 and 3.0 of the directive are inconsistent with this spirit of openness, and we believe that changes are necessary to properly integrate environmental policies into the agency's actions.

OMB Watch is a nonprofit research and advocacy organization that has as its core mission government accountability and improving citizen participation. Public access to government information has been an important part of our work for more than 15 years. For example, in 1989, we launched RTK NET, an online service providing public access to environmental data collected by EPA, which has given us both practical experience and policy experience with disseminating government information. Additionally, OMB Watch has been very engaged in agency regulatory processes, encouraging agency rules to be sensible and more responsive to public need.

DHS, which includes the Coast Guard, Federal Emergency Management Agency, Transportation Security Administration, Energy Security and Assurance Program and dozens of other programs, is the second largest federal agency with oversight for many government activities that significantly impact the environment and public health. Considering the scope of DHS's activities, this directive could seriously reduce the amount of information the public receives on the environmental impact of agency projects.

DHS states in the directive it "believes that the public and NGOs play an important role in the protection of resources. The DHS will encourage early and open public involvement in proposals. Open communication with the American public, consistent with other federal requirements, is the DHS policy." However, other provisions within the directive do not remain

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consistent with this belief in public involvement, particularly the Categorical Exclusions (CEs) and public disclosure provisions. DHS proposes using several broad, vague, new information categories to restrict public access to environmental information currently meant for the public. Additionally, DHS proposes CEs that completely eliminate environmental review and public involvement in certain agency activities. These actions would dramatically reduce the amount of environmental review information available to the public on activities that could seriously affect human health. Neither of these approaches complies with the purpose and spirit of NEPA, nor do they represent the best ways to protect the public.

Disclosure Restrictions

In the management directive's Section 6.2, Classified or Protected Information, DHS lays out the provisions for restricting information from NEPA-related documents. The new categories of information that DHS proposes to withhold from the public are overly broad and only vaguely understood. DHS actually lacks the statutory authority or legal framework to restrict some of these information categories. Proposing to restrict broad categories of information certainly does not encourage public involvement in proposals. By establishing provisions that would allow, and possibly even encourage, DHS officials to withhold tremendous amounts of environmental information from the public, the agency is violating the intentions of the NEPA process. It seems the agency views information only as a danger instead of as a vital democratic tool for keeping the public informed and safe.

DHS, as well as every other federal agency, is specifically prohibited from publicly disclosing classified information in NEPA documents or any other public reports. More to the point, Council on Environmental Quality (CEQ) regulations for implementing NEPA, section 1507.3(c), specifically addresses such restrictions.

Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements that address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

These regulations rightly allow for the restriction of classified information and commitment to public disclosure. Indeed, NEPA includes a provision that an agency must "[m]ake environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (FOIA)." 40 CFR 1506.6(f). Existing exemptions in FOIA already recognize the need to withhold classified information, as well as trade secrets, privacy information, law enforcement investigations and other categories of information where the public interest is outweighed by other considerations. Therefore, these FOIA exemptions already allow DHS to withhold or redact classified and other

exempted information from Environmental Assessments (EA), Environmental Impact Statements (EIS), or other NEPA-related materials. The proper use of FOIA exemptions balances the public's right to information with protections that are needed to maintain national security and other interests. The DHS draft directive does not take this balanced approach to information disclosure. DHS appears willing to eliminate vast amounts of environmental information intended to make the public safer for some assumed improvement in security, rather than establishing procedures to ensure both safety and security concerns are addressed.

However, DHS also indicates it will not release Critical Infrastructure Information (CII), Sensitive Security Information (SSI), Sensitive But Unclassified (For Official Use Only) information, or other types of "sensitive" information. This is in direct conflict with the CEQ regulations for implementing NEPA, which only allow for the restriction of classified information. Strict procedures and criteria control what information qualifies to be classified. These new categories of information are problematic because they are far more subjective in their implementation with little to no oversight or review. However, DHS inappropriately, and in some cases contrary to specific legal provisions, attempts to expand the appropriate exemption for classified information to include these less rigorous information categories.

Critical Infrastructure Information

In the NEPA directive, DHS inappropriately indicates it will withhold any information categorized as CII from NEPA documents. The Homeland Security Act of 2002 (Pub. L. 107-296) mandated the development of CII provisions, and DHS published an interim final rule (6 U.S.C. 131(3)) Feb. 20. While the CII provisions do exempt information in the program from public disclosure under FOIA, that restriction cannot be used to restrict NEPA information. The CII law and interim final rule recognize several limitations of the disclosure protection, and acknowledge that not all information related to critical infrastructure will receive protection.

The statute authorizing creation of the CII program specifically states that the information may not be considered voluntarily submitted, a requirement of the program, if a law or regulation requires the submission. Congress accompanied the law with a report, which clarified the intention that the program should not protect information required under any health, safety, or environmental law.

Unfortunately, DHS narrowed this provision in its interim final rule so that voluntarily submitted information need only be "in the absence of DHS's exercise of legal authority to compel access to or submission of such information." This means that information required under other laws or regulations could still be submitted as CII to DHS because the agency was not compelling the submission. However, DHS clarifies in the rule that submission of information to the CII program could not replace the reporting requirement and CII provisions could not cover the required information in other agencies. Therefore, while the information submitted to DHS's CII program would be withheld from the public, the identical submission required elsewhere would remain unaffected by the CII disclosure restrictions. Therefore, DHS's CII rule established that required submissions containing information related to critical infrastructure cannot be withheld or redacted. Environmental review documents, such as EISs and EAs, are required under NEPA

and therefore even if they contain critical infrastructure information, it may not be withheld from the public. DHS may only withhold duplicate documents submitted to the CII program.

Additionally, other CII provisions make it clear that no information within NEPA documents can be withheld from the public based on the CII category. First, DHS's definition of voluntarily submitted CII also "explicitly excludes information or statements submitted during a regulatory proceeding or relied upon as a basis for making licensing or permitting determinations." Information required under NEPA clearly fits within this exclusion, as private companies must complete these environmental reviews to receive approval and permits for the projects. Also under the CII law and rule, only information "not customarily in the public domain" qualifies for protection from disclosure. Most NEPA information is customarily in the public domain. EAs and EISs are specifically intended to inform a concerned public about the health risks and environmental impacts associated with projects such as gas pipelines, chemical facilities or other infrastructure.

Proposing to withhold NEPA information based on CII status would be unlawful, as it clearly contravenes the CII statutes passed by Congress and DHS's own CII rule. DHS should rewrite Section 6.2 and remove any reference to withholding CII in NEPA documents.

Sensitive Security Information

The DHS draft directive also proposes withholding NEPA information that qualifies as SSI, as defined by a number of statutes and directives. This could result in a troubling expansion of information categorized as SSI and keep important information from the public. The Transportation Security Administration (TSA), created after the 9/11 attacks, holds the authority to restrict SSI from the public. Before this year, SSI information was limited to air transportation security information. In May, DHS and the Department of Transportation (DOT) issued an interim final rule changing the information covered, "requiring employees, contractors, grantees, and agents of DHS and DOT to follow the same requirements governing protection of SSI as those in the transportation sector who are subject to the regulation." This expands the policy to information about any forms of transportation -- maritime cargo, pipelines, and freight transport.

It is unclear how DHS has authority to withhold NEPA required information under this category. OMB Watch believes that the majority of information produced under NEPA requirements should not be categorized as SSI. Regulations define SSI as a specific category of information that requires protection against disclosure (49 C.F.R. Part 1520). U.S. Code limits the disclosure of information obtained or developed in carrying out certain security or research and development activities to the extent that it has been determined the information would be an unwarranted invasion of personal privacy; reveal a trade secret or privileged or confidential commercial or financial information; or be detrimental to the safety of passengers in transportation. NEPA documents are related to environmental analyses and would not be detrimental to transportation security.

Only by further expanding the definition of SSI could the provision apply to NEPA. Such an expansion would be unwarranted and unauthorized. Clearly DHS has the authority to withhold previously generated information marked as SSI, namely security plans for vessels and maritime

facilities. However, information produced as part of an EA or EIS has no basis for protection as SSI.

DHS should rewrite Section 6.2 and clarify that only information previously designated as SSI could be shielded from the public. However, any information developed as part of the NEPA process cannot be marked as SSI.

Sensitive But Unclassified (For Official Use Only)

OMB Watch finds it troubling that DHS Management Directive 11042, "Safeguarding Sensitive But Unclassified (For Official Use Only - FOUO) Information" is included among the types of NEPA information the DHS plans to withhold from the public. The FOUO directive provides no specific procedures or guidelines for how information becomes protected. Any DHS employee, detailee, or contractor can designate information falling within 11 general categories as protected "until determined otherwise" by DHS officials. While filing a FOIA request prompts a review of the information, there does not appear to be procedures to re-evaluate the information for inclusion in NEPA documents if the FOIA review determines the information may be made public. The directive also lacks any oversight mechanism to stop unnecessary exclusion of information and abuse of the system. These failings make the FOUO directive a particularly poor component for limiting public access to important environmental information.

The FOUO directive allows for "sensitive" information to be disseminated on a need-to-know basis. The directive establishes that no special security clearance is required, as the information is not classified or officially restricted in any real sense. "The determination made by an authorized holder of information that a prospective recipient requires access to specific information in order to perform or assist in a lawful and authorized governmental function." OMB Watch cautions DHS against replacing the public's right to know about environmental risks associated major projects, as established in NEPA and the CEQ regulations, with a restrictive need-to-know approach that could deprive citizens of information critical to protecting themselves. Such a shift could easily place the health and welfare of communities around the country at risk.

DHS should rewrite Section 6.2 of its directive to remove any references to "sensitive" information, "sensitive but unclassified" information, or FOUO information.

Presenting Information to the Public

In the directive, DHS explains a process for managing classified or protected information identified within NEPA documents. However, OMB Watch finds the procedures entirely insufficient, as they are unclear, favor secrecy, and have no review mechanism. In addition to the need to narrowly and clearly define information that will be withheld from the public, it is important that DHS establish exact procedures, complete with a review mechanism, for the implementation of the disclosure restrictions.

DHS proposes moving protected information from NEPA documents to appendices for "appropriate reviewers and decision makers." The directive does not define these terms and it is unclear who would qualify as such.

Additionally, there are no procedures detailing how information is identified for removal and placement in an appendix. Is it only information that falls into one of the protected categories? Does the information have to be previously stamped as CII or FOUO or can an employee make that determination when creating NEPA analysis? OMB Watch recommends that DHS eliminate much of the subjectivity and provide specific criteria and guidelines on determining information withholdings. We further urge DHS to only allow information that is classified, previously marked SSI, or exempt under FOIA to be placed in a non-public appendix. No information that is developed for the NEPA process should be exempt from disclosure. For legitimate protected information, DHS should note and explain the redactions in NEPA documents.

The DHS directive also states "if segregation [of information] would leave essentially meaningless material, the DHS elements will withhold the entire NEPA analysis from the public." It is not appropriate for DHS to presume it knows what information the public will find useful. Under FOIA, if any information must be redacted, even if most of a document must be withheld, requestors are granted access to all remaining information. Information that might seem "meaningless" to an agency such as DHS, may still be highly useful to the public. CEQ's regulations on NEPA specifically instruct agencies to organize the NEPA documents such that unclassified portions can be made available to the public. The authority to withhold entire documents based on a subjective assessment of the remaining information's usefulness would be too prone to abuse, and could create an overly secretive NEPA process. OMB Watch urges DHS to remove this provision from Section 6.2 and commit to disclosing all information that is not classified, previously marked SSI, or exempt from FOIA.

Additionally, DHS should establish a review mechanism that allows other agencies and the public to petition for a re-review of withheld information. This would add checks for determining whether information DHS is withholding from the public is "protected" and truly meets the final standards for protection.

Categorical Exclusions

DHS's directive also proposes creating inappropriate new Categorical Exclusions for many different activities and projects. These exclusions would eliminate public disclosure and participation in the NEPA process by outright exempting the listed activities from any environmental review. The public would not receive access to EIS documents or EA reports because DHS would never produce them for the excluded activities. These CEs are the most complete restriction on public involvement in NEPA processes.

CEs are intended to exempt activities that have no impact on the environment, limiting the administrative burden for activities that have very minimal or no environmental impact, such as maintenance activities or developing rules that establish administrative activities. While CEs are a legitimate mechanism to avoid unnecessary and wasteful reviews, many of the activities DHS proposes to exclude from NEPA could potentially have significant environmental impacts. In

the directive, DHS explains that the activities excluded from NEPA review do not "individually or cumulatively have a significant impact on the human health environment." However, many of the activities proposed for exclusion have obvious environmental and human health implications, such as hazardous materials storage, waste disposal, logging, and pest control. Several other CEs requested in the directive are so vague that they could contain environmental impacts and public health risks.

DHS also implies that the proposed CEs simply compile NEPA exclusions among the various elements of DHS before the agency was formed. However, many of the CE's are new or significantly alter and expand previous CEs. For instance, DHS requests that "procurement of non-hazardous goods and services, and storage, recycling and disposal of non-hazardous materials and wastes" be exempted from NEPA review. DHS components such as FEMA and the Coast Guard have had similar CEs, but those were limited to procurement and storage and never included disposal. Waste disposal, even non-hazardous waste, can have significant impacts on air and water quality, property values and more. Given the high potential for impacting the public's health, new and expanded CEs deserve greater discussion and fuller consideration before finalization.

OMB Watch recommends that DHS identify and eliminate from the directive any new, expanded or altered CEs, leaving only those CEs that have been previously approved precisely as written. If DHS wishes to establish new CEs, reword previously approved CEs, or expand existing CEs, then the agency should engage in a public process to fully evaluate these proposals.

OMB Watch recommends that DHS at least eliminate that the following CEs from the draft directive and allow them to be more fully discussed and considered in a separate public process.

- A7 - Procurement of non-hazardous goods and services, and storage, recycling, and disposal of non-hazardous materials and wastes.
- B4 - Provision of on-site technical assistance to non-DHS organizations to prepare plans, studies, or evaluations or to conduct training at sites currently used for such activities.
- B8 - Acquisition, installation, maintenance, operation, evaluation, removal, or disposal of security equipment to screen for or detect dangerous or illegal individuals or materials at existing facilities.
- B9 - Acquisition, installation, maintenance, operation, evaluation, removal, or disposal of target hardening security equipment, devices, or controls to enhance the physical security of existing critical assets.
- B10 - Existing aircraft operations conducted in accordance with normal flight patterns and elevations.
- B13 - Harvest of live trees on DHS facilities.
- B14 - Salvage of dead and/or dying trees on DHS facilities.
- D3 - Repair and maintenance of buildings, roads, airfields, grounds, equipment, and other facilities.
- D5 - Maintenance dredging and repair activities within waterways, floodplains, and wetlands.
- E5 - Natural resource management activities to enhance native flora and fauna, including site preparation and landscaping.

- E6 - Construction or reconstruction of roads on previously disturbed areas on DHS facilities.
- E9 - Except in environmentally sensitive areas, construction, operation, modification, or closure of wells, septic systems, field instruments.
- F1 - Routine procurement, handling, recycling, and off-site disposal of hazardous material/waste.
- F2 - Use of instruments that contain hazardous, radioactive, and radiological materials.
- F3 - Use, transportation, and placement of Nuclear Regulatory Commission (NRC) approved, sealed, small source radiation devices for scanning vehicles and packages.
- G2 - Projects, grants, cooperative agreements, contracts, or activities to design, develop, and conduct national, state, local, or international exercises to test the readiness of the nation to prevent or respond to a terrorist attack of natural or manmade disasters.
- H2 - Issuance of grants for the conduct of security-related research and development or the implementation of security plans or other measures at existing facilities.

These CEs have potential human health and environmental issues associated with them that should receive additional attention before excluding the activities from environmental review. Several of the exemptions are currently so vaguely worded that further clarification is necessary to ensure that health risks are not missed. Others address such new homeland security activities that did not exist until shortly after the 9/11 attacks and could not have been given extensive review yet. For all of these CEs additional description and evaluation are needed before granting exclusions.

Conclusion

In a post 9/11 environment, it is fitting and appropriate to consider and discuss possible new information restrictions. However, by exempting new types of information from public disclosure in NEPA documents, and creating numerous new and questionable exemptions from NEPA review, DHS is creating an atmosphere of secrecy instead of one that favors public involvement and openness. Many of the categories of information DHS cites are new and poorly defined. This could easily allow industry or government officials to subjectively restrict important but embarrassing information. We must not lose sight of the fact that these NEPA documents contribute to an important process designed to help ensure the public's safety. The poorly defined procedures and lack of review leave DHS's proposal prone to abuse and overuse, which would unnecessarily remove vast amounts of environmental information from the public. OMB Watch believes that current directive goes too far in its plan to withhold information and exempt major projects from environmental review.

In summary, OMB Watch's recommends that DHS:

- Remove any reference to CII from the directive. Information that is compelled by NEPA and the subsequent CEQ regulations cannot legally be designated and withheld as CII.
- Clarify that only information previously designated as SSI could be withheld from the public. However, any information developed as part of the NEPA process cannot be marked as SSI.

- Remove references to "sensitive" information, "sensitive but unclassified" information, or FOUO information. These overly vague and subjective categories do not provide sufficient justification to withhold information from the public and should not be used.
- DHS should engage the public in an open process for evaluating how information is withheld.
- Add a review mechanism that allows other agencies and the public to petition for a review of withheld information.
- Provide specific guidelines on how officials identify and evaluate information for protected status. Only information that is classified, previously marked SSI, or exempt under FOIA should be protected. No information that is developed for the NEPA process should be exempt from disclosure.
- All legitimately protected information that is placed in a non-public appendix should be noted by DHS in the NEPA documents, along with an explanation of why and under what statute the information was redacted.
- DHS should commit to disclosing all information that is not classified or exempt from FOIA even if it believes the information is "meaningless." DHS should not engage in presuming the public's needs or uses for information.
- Identify and eliminate from the directive any new, expanded or altered CEs, leaving only those CEs that have been previously approved precisely as written.
- Engage in a public process to fully evaluate any new, expanded, or reworded CEs.

Thank you for your consideration of these comments. OMB Watch looks forward to working with DHS in developing policies that protect the public and preserve the public's right-to-know.

Sincerely,



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